IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 527

O. C. SMITH, ET AL.,

Petitioners,

v.

HUMBLE OIL AND REFINING COMPANY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Leighton Cornett
Williamson Building
Paris, Texas

Steven G. Condos
Republic National Bank Building
Dallas, Texas

Attorneys for Petitioners

Of Counsel:

Washington, D. C. THIEL PRESS 202 393-0625

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS OF THE COURTS BELOW

The opinion of the Court of Civil Appeals in this cause is not reported, and is printed in the Appendix, pages i-iv. The opinions of the District Court appears in the Appendix on pages v-xi.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The judgment of the United States Court of Appeals for the Fifth Circuit in this cause was rendered and entered on May 22, 1970.

2. Jurisdiction to issue writ of certiorari is invoked under 28 U.S.C., Section 1254, and should be issued by force of Supreme Court Rule 19(b).

QUESTION PRESENTED FOR REVIEW

The question presented for review in this Honorable Court is whether or not the United States District Court for the Eastern District of Texas had jurisdiction of petitioners' case.

STATEMENT OF THE CASE

The complaint filed in the District Court alleged jurisdiction based on three grounds:

1. Diversity of Citizenship;
2. Article 1983, Title 42, of the U.S. Code;
3. Setting aside a judgment of a State Court based on fraud.

The allegations of the complaint state that the plaintiffs are suing as heirs at law of one Harriet Murphy, who were the owners of legal title to the land described in a consoli-

dated judgment in Causes Nos. 8689, 8755, and 8989, entered in the State District Court of Rusk County, Texas, in 1934. The tract of land involved in that State litigation was a 149 acre tract which through the years has produced considerable amount of oil. Humble Oil and Refining Company, Inc. was a party plaintiff in the State Court action, and has operated the oil lease on this tract of land since that time, up until the date of the filing of the Complaint in the District Court below. Plaintiffs allege that they and their predecessors in title were damaged and injured by the conduct of Humble Oil and Refining Company under color of State law, and under color of custom and usage, and that their damages and injuries were caused by the judgment of the State District Court, acting under laws of the State of Texas, and that this conduct on the part of Humble Oil and Refining Company, Inc. deprived plaintiffs of their rights, privileges and immunities secured by the laws and the Constitution of the United States. Plaintiffs further allege that they were deprived of their rights as citizens of the United States and of the State of Texas, in that they were unable to secure a hearing in the State Court on their application for a Bill of Review, which was filed in the District Court of Rusk County, Texas, on the 17th day of March, 1965. They had requested the State District Court to set the case for trial on its merits on numerous occasions.

The background for this lawsuit, as shown in plaintiffs' complaint, arises out of a trespass to try title suit in the District Court of Rusk County, Texas, in Cause No. 8989, on the 24th day of December, 1931. In that suit, certain heirs of one Joe Turner were made parties defendant, as well as certain heirs of one Harriet Murphy. The Complaint alleges that Humble Oil and Refining Company, Inc. was guilty of fraudulent conduct in having judgment entered by the State Court which deprived the heirs of Harriet Murphy of all interest in the 149-acre tract of land. Some of the Harriet Murphy heirs were made parties to the lawsuit, in Cause No. 8989, others were not. A judgment was rendered

in 1934. It was alleged in the Complaint that none of the heirs were present at the time of the trial because of fraudulent conduct on the part of Humble Oil and Refining Company, Inc., nor did any of the heirs know of any judgment having been entered, and no one of the heirs entered into an agreement with reference to this judgment, either through his attorney or as individuals, and no compromise agreement was executed by any of the Harriet Murphy heirs. It was only some time after the judgment was entered that some of these heirs, who were then living, learned that a judgment had been entered. Then they attempted to do something to set the judgment aside. Efforts on their part, although constituting due diligence, were not successful. It is alleged that they were unable to secure their lawful and civil rights to which they were entitled because of their lack of money and because they were ignorant, uneducated, East Texas Negroes, subjected to the worst sort of racial prejudice, threats and intimidation. It is further alleged that Humble Oil and Refining Company, Inc. was one of the most powerful economic interests in the East Texas oil field at the time the judgment was entered in 1934, and that this business giant had continued to exercise a dominant and powerful influence continually in that area until the present time. The entry of the judgment in 1934 was not the result of negligence on the part of any of the Harriet Murphy heirs, but due diligence was used to prevent the rendition of such judgment. The heirs had a good defense to this action, which they were prevented from making by the fraud of Humble Oil and Refining Company, Inc., its agents and employees, wholly unmixed with any fault or negligence of these Harriet Murphy heirs. It is further alleged that Rusk County, Texas was and is part of the Deep South; that a segregated society existed in 1934 in the most vicious form; that Humble Oil and Refining Company, Inc. encouraged and fostered this system of second class citizenship for the Negro citizens, which resulted in placing these plaintiffs in an inferior and unequal position so that they were

unable to protect their rights concerning Humble Oil and Refining Company, Inc. in the State District Court, and that these actions were deliberate and premeditated, and designed by Humble Oil and Refining Company, Inc., to defraud these plaintiffs of their rights as American citizens. They further allege that since 1930 there have been as many as twenty-five (25) producing oil wells on the tract of land in question, and although the amount of production is unknown to plaintiffs, it has reached substantial proportions, and Humble is still producing oil from this lease. Plaintiffs asked the United States District Court that the judgment of the District Court of Rusk County, Texas, in Consolidated Causes Nos. 8689, 8755, and 8989 be set aside, for their damages, and for other relief to which they may be entitled.

REASONS FOR GRANTING WRIT OF CERTIORARI

Petitioners urge to this Honorable Court that the District Court erred in at least two particulars:

1. The allegations of the Complaint entitled them to a hearing in the Federal District Court, under the provisions of Section 1983, Title 42, U.S. Code, because they were deprived of their rights and privileges under color of the State law as a result of the entering of the judgment by the State Court on behalf of Humble Oil and Refining Company in 1934.

2. The Court further erred because the plaintiffs are clearly entitled under the law of the Federal Judiciary, to come into the Federal Court to set aside a State judgment based on fraud.

The District Court granted respondent's Motion to Dismiss on the grounds that the Complaint failed to allege sufficient facts showing that appellants had been denied rights guaranteed to them by the Civil Rights Act and by Federal Court decisions. Such a Motion to Dismiss should

not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim. *Barnes v. Merritt*, 376 F.2d 8 (5 Cir. 1967), citing *Dew v. Tallahassee Theatres, Inc., et al.*, 333 F.2d 630 (5 Cir. 1964); *Arthur H. Richland Co. v. Harper, et al.*, 302 F.2d 324 (5 Cir. 1962); *Millet v. Godchaux Sugars, Inc.*, 241 F.2d 264 (5 Cir. 1957).

In determining whether the complaint states a claim upon which relief can be granted under Section 1983, the Court must assume the truth of plaintiffs' factual allegations and reasonable conclusions to be drawn therefrom. *Cooper v. Pate*, 378 U.S. 546, 84 S.Ct. 1733, 12 L. Ed. 2d 1030 (1964). Although the complaint involved the State Court's judgment adjudicating property rights between petitioners and respondent, Federal Courts have often rejected pleas of abstention involving property rights. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 84 S.Ct. 1293, 12 L. Ed. 2d 350 (1964); *County of Allegheny v. Frank Mashuda Co.*, 360 U.S. 185, 79 S.Ct. 1060, 3 L. Ed. 2d 1163 (1959); *Liberty Mutual Insurance Co. v. Pennsylvania R. Co.*, 322 F.2d 963 (7th Cir. 1963); *Guy v. Rolvaag*, 233 F.Supp. 301 (D. Minn. 1964).

The Fifth Circuit Court opinion on page 3 of the opinion, states the following:

> "The question, therefore, is whether the federal court had jurisdiction to entertain the *quasi in rem* proceeding involved here when an identical suit involving the same property was pending in the state court."

It is respectfully submitted that this is an erroneous conclusion on the part of the Appellate Court. Under no circumstances, it appears to petitioners, can it be said that the two cases are "identical suits." It is true that in 1965, a Bill of Review proceeding was filed in the District Court of Rusk County, Texas, to set aside a judgment rendered in that Court in 1934. The complaint of the petitioners in

the District Court alleged that they had been unable to secure a trial of that proceeding in the State Court, although numerous demands had been made upon the trial court. The Judgment of Dismissal of the Complaint filed by petitioners in the U.S. District Court was entered on January 9, 1969. The State Court proceeding was then dismissed by petitioners, and on January 20, 1969, they filed a Motion for New Trial, seeking to set aside the Order of Dismissal. On March 24, 1969, an oral hearing was held on plaintiffs' Motion for New Trial, and then on the 1st day of July, 1969, the trial court signed an order denying plaintiffs' Motion for New Trial. The complaint in the Federal Court alleges a deprivation of petitioners' rights and privileges under color of State law as a result of the entering of the judgment by the State Court on behalf of Humble Oil and Refining Company in 1934, in violation of Section 1983, Title 42, U.S. Code, and the further grounds that the plaintiffs were entitled to redress of their grievance in the Federal Court to set aside a State judgment based on fraud. It is true that the allegation of fraud was a part of the Bill of Review proceeding in the State Court, but the allegations of violation of Section 1983, Title 42, U.S. Code, was not a part of the Bill of Review proceeding in the State Court.

There have been numerous exceptions to the rule that "Once a court, State or Federal, has assumed jurisdiction of an *in rem* or *quasi in rem* proceeding, then that court may exercise its jurisdiction to the exclusion of any other court and the res in question is withdrawn from the jurisdiction of any other court." It appears that the true rule announced by the decisions is that where the Court must *get hold of the property* (emphasis ours), in order to effectuate its jurisdiction, the jurisdiction first invoked will prevent the second jurisdiction from going forward in order to prevent an unseemly conflict between the two courts. See *Palmer v. Texas*, 1909, 212 U.S. 118, 29 S.Ct. 230, 53 L. Ed. 435; *Kline v. Burke Construction Company*, 1922, 260 U.S. 226, 43 S.Ct. 79, 67 L. Ed. 226; *Penn General*

Casualty Co. v. Pennsylvania, 1935, 294 U.S. 189, 55 S.Ct. 386, 79 L. Ed. 850; *Princess Lida of Thurn and Taxis v. Thompson*, 1939, 305 U.S. 456, 59 S.Ct. 275, 83 L. Ed. 285. Each of these cases emphasizes the *physical possession and custody* (emphasis ours) of the res by the Court or its representative.

There is nothing in the case at bar which indicates in any way that the State Court had taken physical possession of the land involved. As a matter of fact, the allegations of the complaint ask only for money damages. The *Kline* case, *supra*, emphasizes the fact that the rule of exclusive jurisdiction has no application in cases where the object of the subsequent suit in Federal Court is not to seize or acquire possession of property in actual physical custody of the State Court.

Most of these Federal cases on jurisdiction contain opinions of the Federal Courts long before the Federal Judiciary announced a more liberal policy of granting our Negro citizens certain additional civil rights, and liberalized procedures in knocking at the Federal door of justice. The complaint filed in the District Court alleges a denial of civil rights. Can it be said that the Federal District Court door is shut, based on court decisions of sixty-five (65) years ago? Should not this Honorable Supreme Court take into consideration the liberalization of the Judicial and Legislative philosophy which will permit our Negro citizens to open the door to the Federal Courthouse, based on a more liberal approach on the part of the Judiciary to those who have been denied their civil rights. Surely, if our Judicial System of justice has liberalized itself in any way, our Negro citizens should not be denied their right to present to a Federal District Court a redress of their grievances, by a hyper-technical approach to the problem of conflicting jurisdiction. The Congress of the United States, the Supreme Court of the United States, and our entire Federal Judiciary has opened the door in recent years that was once closed to our Negro citizens. Surely the door ought not to be closed in the face of these petitioners.

Petitioners have been unable to find a case involving conflicting jurisdiction between State and Federal Courts in a similar fact situation. It would appear, however, in justice and fairness and equity to our Negro citizens who reside in the "Old South" (deep East Texas), that a Federal District Court should entertain a lawsuit based on fraud in the rendition of a State Court judgment and a deprivation of the civil rights guaranteed to these citizens when the allegations of the complaint point out that the petitioners were unable to secure their just rights in the State Court.

CONCLUSION

Petitioners respectfully submit that a Writ of Certiorari should issue.

LEIGHTON CORNETT
Williamson Building
50 North Main Street
Paris, Texas

Attorneys for Petitioners

STEVEN G. CONDOS
Republic National Bank Building
Dallas, Texas

Of Counsel

August 11, 1970

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28386

O. C. SMITH, ET AL,
Plaintiffs-Appellants,

versus

HUMBLE OIL AND REFINING COMPANY, INC.,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

(May 22, 1970)

Before WISDOM, GOLDBERG, and INGRAHAM, Circuit Judges.

PER CURIAM: This is an appeal from an order of the district court dismissing plaintiffs' complaint for lack of jurisdiction. We affirm.

The litigation before us had its genesis in a 1934 trespass to try title suit brought in a Texas state court. In that suit Humble Oil and Refining Company, defendant herein, sought to clear the title to certain land in East Texas on which it had an oil lease. That suit apparently resulted in a determination that Humble

had a valid leasehold in the land and that title to the disputed property rested in parties other than the plaintiffs' predecessors in title.

In 1965 plaintiffs filed a petition for a bill of review in the District Court of Rusk County, Texas, seeking to set aside the 1934 judgment, alleging that it was obtained by fraudulent conduct on the part of Humble. Subsequently, in October 1968 plaintiffs filed this suit in the United States District Court for the Eastern District of Texas, seeking to set aside the same 1934 judgment. Humble filed a motion to dismiss, asserting that the prior pendency of the state proceeding prevented the federal court from exercising jurisdiction over the property in question. The trial court, upon finding that the bill of review proceeding was still pending in the state court dismissed the plaintiffs' petition for lack of jurisdiction over the subject matter. Plaintiffs have appealed. Agreeing with the determination of the district court, we affirm.

The original 1934 trespass to try title suit was an action to settle title as between the named plaintiffs and named defendants regarding specific land. It was therefore an action *quasi in rem*. *Humble Oil and Refining Co. v. Sun Oil Co.*, 5 Cir. 1951, 191 F.2d 705, *cert. denied*, 342 U.S. 920; *Buchanan v. Girvin*, Tex. 1944, 176 S.W.2d 729. In the state bill of review proceeding filed in 1965 and in the federal proceeding now before us the plaintiffs prayed that the original 1934 judgment be set aside and that title to the land be adjudged to rest in plaintiffs' predecessors. Thus both suits involve a relitigation of the merits of the title controversy litigated in the 1934 suit. It follows that both the state and federal suits

to review the 1934 judgment are *quasi in rem* proceedings, since the object in both is to relitigate the same issue involved in the trespass to try title suit, a *quasi in rem* proceeding. The question, therefore, is whether the federal court had jurisdiction to entertain the *quasi in rem* proceeding involved here when an identical suit involving the same property was pending in the state court.

It has long been the rule that once a court, state or federal, has assumed jurisdiction of an *in rem* or *quasi in rem* proceeding, then that court may exercise its jurisdiction to the exclusion of any other court and the res in question is withdrawn from the jurisdiction of any other court. *Princess Lida of Thurn and Taxis v. Thompson*, 1939, 305 U.S. 456, 59 S.Ct. 275, 83 L.Ed. 285; *Penn General Casualty Co. v. Pennsylvania*, 1935, 294 U.S. 189, 55 S.Ct. 386, 79 L.Ed. 850; *Kline v. Burke Constr. Co.*, 1922, 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226; *Palmer v. Texas*, 1909, 212 U.S. 118, 29 S.Ct. 230, 53 L.Ed. 435. Thus it is clear that once the plaintiffs filed their 1965 bill of review proceeding in the Texas court, that court's jurisdiction attached and the federal district court was without jurisdiction to entertain plaintiffs' subsequent suit involving title to the same property. We therefore conclude that the court below was correct in dismissing the present case because of the prior pendency of bill of review proceedings in the Texas court.

The plaintiffs, however, have asserted before this court, both in their brief and on oral argument, that the state bill of review proceeding has been dismissed. The record is devoid of any evidence that this assertion

was ever presented to the trial court. Moreover, the record before us is devoid of any evidence that the state suit has in fact been dismissed. Under the circumstances we cannot indulge in clairvoyance and assume that the state proceeding is not still pending. For aught that appears of record the state court has exclusive jurisdiction over the res in issue.

The order of the district court dismissing the plaintiffs' complaint is AFFIRMED.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

Paris Division

O. C. SMITH, *et al.*,

v. : Civil No. 492

HUMBLE OIL & REFINING COMPANY, INC.

ORDER

The plaintiffs in the above-styled and numbered cause have instituted this action to set aside a judgment rendered in the Fourth District Court of Rusk County, Texas, on or about January 30, 1934, in Consolidated Causes Nos. 8689, 8755, and 8989, styled Virginia Turner et al. v. R. M. Weaver, Virginia Turner et al. v. W. S. York, and Humble Oil & Refining Co. v. Virginia Turner. The plaintiffs here allege that this 1934 judgment, rendered in a trespass to try title suit, was secured by fraud on the part of the defendant herein.

Before filing suit in this court, the plaintiffs, on March 17, 1965, filed an application for Bill of Review in the Fourth District Court of Rusk County, Texas, seeking to set aside the 1934 decree. This action is still pending in the state court.

By motion to dismiss, the defendant challenges the jurisdiction of this court over the subject matter of this dispute. Without adverting to the merits of plaintiff's claim, the court is of the view that the defendant's motion should be granted.

Prudential Insurance Co. of America v. Zimmerer, 66 F.Supp. 492 (D. Neb. 1946), involved an action to quiet title wherein the federal district court stayed its proceedings pending the outcome of the same suit in the state court.

At the time these actions were filed, there was in effect a prior foreclosure decree relating to the same land. The court said "The original foreclosure proceeding was also an action *in rem*, as is the pending equitable proceeding for the vacation of the decrees in that earlier case." 66 F.Supp. at 494.

Though this court may possibly have had jurisdiction over this matter in the absence of the pending state action, it is without jurisdiction as a matter of law in this particular case. The rule has long been settled that, "if a court of competent jurisdiction, Federal or state, has taken possession of property, or by its procedure has obtained jurisdiction over same, such property is withdrawn from the jurisdiction of the courts of the other authority as effectually as if the property had been entirely removed to the territory of another sovereignty." *Palmer v. State of Texas* 212 U.S. 118, 125, 27 S.Ct. 230, 53 L. Ed. 435 (1908). See also *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 62 S.Ct. 139, 86 L. Ed. 100 (1941); *Princess Lida v. Thompson*, 305 U.S. 456, 59 S.Ct. 270, 83 L. Ed. 285 (1939); *Kline v. Burke Construction Co.*, 260 U.S. 226, 43 S.Ct. 79, 67 L. Ed. 226 (1922); *Farmers' Loan & Trust Co. v. Lake Street Elevated R.R. Co.*, 177 U.S. 51, 20 S.Ct. 564, 44 L. Ed. 667 (1900); *Neagle v. Brooks*, 373 F.2d 40 (C.A. 10th Cir. 1967); *United States v. Allen*, 328 F.2d 377 (C.A. 5th Cir. 1964); *Albuquerque National Bank v. Citizens National Bank in Abilene*, 212 F.2d 943 (C.A. 5th Cir. 1954); *Butler v. Judge of U.S. Dist. Ct.*, 116 F.2d 1013, 1015 (C.A. 5th Cir. 1954); Cf., *Tomivasu v. Golden*, 358 F.2d 651 (C.A. 9th Cir., 1966).

The defendant has alleged several grounds in support of its motion to dismiss, the primary one being that this court is precluded from exercising its jurisdiction over the subject matter herein because of the pendency of the prior proceeding in the Texas state court. Essentially, the defendant's argument is that both the 1934 action, and the state court proceeding to set aside the judgment rendered in that

action, are *in rem* actions, and that the state court's jurisdiction having first attached to the *res* in this suit, the court is precluded from exercising its jurisdiction over said *res* to defeat or impair the state court's jurisdiction.

Though irrelevant to the outcome here, it is noted that a trespass to try title suit is a proceeding *quasi in rem*. *Buchanan v. Girvin*, 176 S.W.2d 729 (Tex. Sup. Ct., 1944); *State v. Bryan*, 210 S.W.2d 455 (Tex. Civ. App., Austin, writ ref'd n.r.e., 1948). However, for most purposes, proceedings *in rem* and proceedings *quasi in rem* are treated identically. See: Anno. 126 A.L.R. 664 (1939).

In several instances, the judgment rendered in an *in rem* action has been held to be the *res* in a subsequent action to set aside the decree. *Prudential Ins. Co. v. Zimmerer*, 66 F.Supp. 492, 495 (D. Neb., 1946); *Martin v. Martin*, 292 S.W.2d 9 (Tenn. Sup. Ct., 1956); *State ex rel. Sparrenberger v. District Court of Custer County*, 214 P. 85 (Mont. Sup. Ct.; 1923), and *Everett v. Everett*, 47 N.Y.S. 994 (N.Y. App., 1897), rev'd on other grounds, 73 N.E. 231 (N.Y. Sup. Ct., 1905), *writ dism.*, 215 U.S. 203, 30 S.Ct. 70, 54 L. Ed. 158 (1909), *cf.*, *Randall v. Randall*, 284 F.2d 229 (D.C. Cir. 1960). Accordingly, this court holds that the 1934 judgment involved here is the *res* of this action.

Accordingly, it is ORDERED that the defendant's motion to dismiss be, and it is hereby, granted.

SIGNED AND ENTERED this 9th day of January, 1969.

/s/ Wm. Wayne
Justice
United States District Judge

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TEXAS

Paris Division

O. C. SMITH, *et al.*,

v. : Civil No. 492

HUMBLE OIL & REFINING COMPANY, INC.

ORDER

On January 9, 1969, an order was entered granting the defendant's motion to dismiss. On January 20, 1969, the plaintiff filed a motion for new trial, seeking to set aside the order of dismissal. On March 24, 1969, an oral hearing was held on plaintiffs' motion for new trial. The court is disposed toward denying plaintiffs' motion for new trial, and in so doing, the court reaffirms the views set forth in the order of dismissal entered on January 9, 1969.

The plaintiffs alleged a cause of action under the Civil Rights Act, 42 U.S.C., Section 1983. The judgment sought to be set aside was in a state court action between private litigants. There has been no showing of any unlawful or conspiratorial conduct on the part of the court rendering the 1934 judgment in question here. Therefore, since the conduct complained of was by a private individual and not under color of state law, no cause of action has been stated under the federal Civil Rights Act. *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 634 (5th Cir. 1967); *Cole v. Smith*, 344 F.2d 721 (8th Cir. 1965); *Dinwiddie v. Brown*, 230 F.2d 465, 469 (5th Cir. 1956); *Swift v. Fourth Nat. Bank of Columbus, Ga.*, 205 F.Supp. 563 (M.D. Ga. 1962).

Absent the support of a question of federal law, the jurisdiction in this court must be grounded on diversity of citizenship. The complaint alleges that the defendant is a

resident of the State of Texas, and it appears that the majority of the plaintiffs are citizens of the State of Texas. The requisite diversity, therefore, is lacking. *Slaughter v. Toye Bros. Yellow Cab Co.*, 359 F.2d 954 (5th Cir. 1966). 1 Moore's Federal Practice 0.60 (8.-4) at 644 (2d ed. 1968).

Accordingly, it is ORDERED that plaintiffs' motion for new trial be, and it is hereby, denied.

SIGNED AND ENTERED this 1st day of July, 1969.

/s/ Wm. Wayne
Justice
United States District Judge